31 Orgl.

Supreme Court of the United States

OCTOBER TERM, 1917.

Ex parte

In the Matter

of

HASSAN ABDU, SAID ACHMED, SALI ACHMED, ACHMED HASSEN, ISHMEIL ALI and JOSE SAB,—

Petitioners.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND PETITION FOR WRIT OF MANDAMUS.

SILAS B. AXTELL,
Attorney for Petitioners.

The Hecla Press, 57 Warren St., N. Y. Tel. 6290 Barclay.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. ORIGINAL.

Ex parte

In the Matter

of

HASSAN ABDU, SAID ACHMED, SALI ACHMED, ACHMED HASSEN, ISHMEIL ALI and JOSE SAB,

Petitioners.

Motion for Leave to File Petition for Mandamus.

Now come your petitioners Hassan Abdu *et al.*, by Silas B. Axtell, their attorney and counsel, and move for leave to file their petition for a Writ of Mandamus hereto annexed, and they further move that a rule be entered and issued, directing William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Judicial Circuit, to show cause, why a Writ of Mandamus should not issue

against him in accordance with the prayer of the said petition, and why said petitioners should not have such other and further relief in the premises as may be just and meet.

SILAS B. AXTELL,
Attorney and Counsel for
Petitioners,
1 Broadway,
New York City.

SUPREME COURT OF THE UNITED STATES.

In the Matter of HASSAN ABDU, SAID ACHMED, SALI ACHMED, ACHMED HASSEN, ISHMEIL ALI and JOSE SAB. Petitioners.	Petition for Mandamus to compel filing of transcript of record without prepayment of Clerk's fees.

To the Hon. Edward D. White, Chief Justice of the United States and to the Associating Justices of the Supreme Court of the U. S.:

The petition of Hassan Abdu *et al.*, respectively shows:

Your petitioners, six in number, Hassan Abdu, Said Achmed, Sali Achmed, Achmed Hassen, Ishmeil Ali and Jose Zab, Arabians by nationality, were all seamen and members of the crew of the S.S. *Nigretia*, a British vessel, at the time under charter to the French line, and heretofore and on or about the 13th day of December, 1916, your petitioners filed a libel in the United States District Court for the Southern District of New York, against the said S.S. *Nigretia*, for wages due to each of them, as a result of the refusal of the master to comply with the demand for half wages made under Section 4530 of the United States Revised Statutes in the sum of approximately $350.00 each. That a bond in said action was duly given; issue was joined and the case placed upon the Admiralty Calendar and thereafter came up for trial before

the Hon. Martin T. Manton, on or about the 2nd day of May, 1917, and a decree later rendered for the libelants. Upon re-argument, the decree for libelants was vacated and a final decree entered, dismissing the libel on July 5th, 1917. That on the 16th day of July, 1917, petitioners as libelants in said action, appealed from the decree dismissing the libel and filed assignment of errors the same day.

The action was commenced herein and the libel filed in the District Court under the provisions of Section 1630a of the United States Compiled Statutes of 1916, being the Act of July 1st, 1916, Chapter 209, Article 1, found in 39 Statutes at Large, page 313, which was a rider to the Civil Sundry Appropriation Act, and which read as follows:

> "For fees of clerks—$215,000: Provided that the Courts of the United States shall be open to seamen without furnishing bonds or prepayment of or making deposit to secure fees or costs, for the purpose of entering or prosecuting suit or suits in their own name and for their own benefit, for wages or salvage and to enforce laws made for their health and safety."

That under the provisions of the 1916 statute, your petitioners as libelants in said wage suits, did not file any stipulation for costs nor did they prepay any of the fees of clerks.

That on the 30th day of July, 1917, your petitioners made a motion in the District Court for an order permitting petitioners as libelant-appellants to dispense with the filing of a bond as security for costs on the appeal. That said motion came on to be heard before Hon. Martin T. Manton, District Judge, on the 2nd day of August, and said motion

was granted and an order entered thereon on the 4th day of August, 1917, dispensing with the bond as security for costs on appeal. That said order was granted under the authority of Section 1630a of the United States Compiled Statutes, 1916, the section above quoted. That petitioners, as libelant-appellants in said action, tendered the twenty additional copies of the transcript of the record to William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, for filing, and said Clerk refused to file said transcripts of the record unless a deposit of $35.00 was made to secure his fees, as provided by the Court rules.

On October 23rd, 1917, a notice of motion was served on said Clerk of the United States Circuit Court of Appeals for the Second Circuit, to compel him to file said copies of the transcript of the record without payment to him of a deposit of $35.00 as a security for his fees, and before the hearing of said motion, petitioners' attorney was served with a notice of motion in the Circuit Court of Appeals, on behalf of the claims of the S.S. *Nigretia*, to compel the libelant-appellants to file a bond as security for costs on appeal. That by consent, both of said motions came on to be heard at the same time before the Justices of the United States Circuit Court of Appeals for the Second Circuit, and after argument, a decision was rendered by said Court denying the motion of the petitioners as libelant-appellants, and granting the motion of claimants, with the following short opinion:

> "The proviso to Sec. 1 of C. 209, 1916, making an appropriation for clerks' fees does not apply to the Clerk of The C. C. A. of this Circuit, who is paid a salary and not out of fees. Nor to anything occurring after July

1, 1917. See Rev. Statutes, Sec. 3690. Motion denied. Appeal staid.

H. G. W.
H. W. R.
C. M. H."

It was obvious from the opinion just quoted that the act upon the authority of which petitioners had relied in making their motion had lapsed and was no longer in force at the time of such motion. Petitioners thereupon on February 5th, 1918, renewed their previous motion, but based their petition for relief upon the authority of the statute as re-enacted at the first session of the 65th Congress, being the Act of July 12th, 1917, making provision for clerks' fees from the fiscal year, June 30th, 1917, to June 30th, 1918, the exact text of which is as follows:

> "For fees of clerks, $215,000: Provided, That courts of the United States shall be open to seamen, without furnishing bonds or prepayment of or making deposit to secure fees or costs, for the purpose of entering and prosecuting suit or suits in their own name and for their own benefit, for wages or salvage and to enforce laws made for their health and safety: PROVIDED FURTHER, That for the calendar year nineteen hundred and seventeen, and thereafter, the maximum personal compensation of clerks of the United States district courts shall in no case exceed $3,500 per annum, and that single fees only shall be charged by United States marshals and clerks of the United States district courts against the United States and against private litigants in every judicial district."

The Circuit Court of Appeals after hearing argument, denied this motion with the following opinion (*per curiam*):

"This motion is renewed because of the passage at the first session of the 65th Congress, of the Act of June 12, 1917.

This appropriation bill (at 40 Stat., 157) under the sub-heading or caption 'United States Courts' allots 'for fees of Clerks, $215,000, provided that Courts of the United States shall be open to seamen without furnishing bond or prepayment of or making deposit to secure fees or costs, for the purpose of entering and prosecuting suit or suits in their own name,' etc.

It is urged that this statute applies to the prosecution of appeals in the Circuit Courts of Appeals; and it is apparently thought that the appropriation covers salary of the Clerk of this Court.

This is a mistake. Clerks of Circuit Courts of Appeals have a stated salary not dependent on fees, of $3,500 each, and for the fiscal year ending June 30, 1918, appropriation therefor was made by Chapter 163 of 1917 (Act signed March 3, 1917, and appropriation stated in 39 Stat., p. 1119).

The statute relied upon by the moving party can refer therefore only to Courts other than Circuit Courts of Appeal, and certainly to District Courts, for the Clerks of which no provision is made in Chapter 163, *supra*.

It follows that the motion must be denied."

The Court decided the question solely and entirely upon the ground that the Clerk of the Circuit Court of Appeals was not paid out of fees but was paid a salary, unlike the Clerk of the District Court who is paid a yearly sum up to $3,500.00 out of fees collected.

Your petitioners submit that the matter of salaries to clerks or compensation out of fees is a wholly immaterial and irrelevant consideration in the determination of the question here presented.

The circumstances under which this statute was enacted are peculiar and controlling in its interpretation. It was not a part of the Seamen's Act or an amendment to any existing statute, except the statute of the year before and which was practically the same, but was a rider attached to the Civil Sundry Appropriation Act where Congress set apart certain moneys in payment of fees in Government cases to clerks of its courts. By Section 1400 of the United States Compiled Statutes, 1916, being the Act of June 6th, 1910, Chapter 791, Section 1, the Clerks of the United States Circuit Courts of Appeal are required annually to account to the Attorney-General of the United States for all moneys and emoluments of their offices over and above necessary office and other expenses for the year. This is similar to the provision requiring District Court Clerks to account to the Attorney-General. The United States is not required to pay any clerks fees either in the Circuit or District Courts. The clerks of both courts are therefore unable to properly account for fees due for such work. The $215,000 appropriation was specifically made to cover such deficits. In support of this, petitioners here submit a copy of the letter received from the Department of Justice in response to an inquiry by proctor for libelant-petitioners, as to the purpose of said statute, and the availability of the funds so appropriated to accounts of Clerks of the Circuit Court of Appeals.

"DEPARTMENT OF JUSTICE
DIVISION OF ACCOUNTS
Washington

October 17, 1917.

SILAS B. AXTELL, Esq.,
Attorney at Law,
New York, N. Y.

Sir:—

In response to your inquiry of October 10th, 1917, you are informed that the appropriation entitled 'Fees of Clerks, U. S. Courts,' is available in so far as it may be needed to pay fees earned from the United States by clerks of District Courts, also by Clerks of the Circuit Courts of Appeals.

The system of accounting governing clerks' offices is exceedingly complex. If you care to examine into the matter more fully you might request the United States Marshal to allow you to read the Instructions to Clerks of Courts, effective from June 1st, 1916.

It is not to be assumed that the question whether payment is or is not made to a clerk out of the appropriation in question for fees earned from the United States for his services is a factor having any material weight in the taxation of costs.

Respectfully,

(Signed) C. SATTERFIELD,
Chief, Division of Accounts."

(Italics mine.)

The question, therefore, is not one of fees or salaries, but of yearly accountings which the clerks both of the Circuit Court of Appeals and the District Courts are required by statute to make to the Attorney-General. The $215,000.00 is to cover deficits in the accountings of both; the proviso at-

tached thereto should, therefore, be applicable to both.

Petitioners further call the attention of this Court to the fact that the wording of the statute easily covers the rights of petitioners as to costs on appeal. The wording of such statute is "that the COURTS OF THE UNITED STATES SHALL BE OPEN TO SEAMEN."

That Congress intended said proviso to apply to Clerks of the Circuit Court of Appeals is evident, not only from the statute itself, but from the policy of Congress towards seamen as evidenced by the comparatively recent legislation relating to American merchant seamen.

On March 4th, 1915, there was enacted by Congress the Seamen's Act, entitled "An act to Promote the Welfare of American Seamen and The Merchant Marine of the United States; to Abrogate Arrest and Imprisonment As a Penalty for Desertion and To Secure the Abrogation of Treaty Provisions in Relation thereto and to Promote Safety at Sea," etc.

This Act, as indicated, contains provisions which are radical and revolutionary. It provides, in Section 4530 (the one out of which grows this litigation), that seamen on a foreign vessel, while in ports of the United States, can demand and receive upon demand one-half the wages they had earned, and, as contended by the seamen, not paid until the date of demand.

This section was intended by Congress to result in an equalization of wages on foreign and domestic vessels engaged in foreign trade with the United States.

Congress further legislated as a part of the Seamen's Act that the treaties between the United States, providing for the arrest of deserting seamen, from foreign vessels, while in our ports, should be abrogated, and pursuant to the provisions of the treaties themselves, and the said Act of Congress, the treaties were abrogated twelve months after the passage of the Act.

The enforcement of the Act has naturally been opposed by owners of foreign vessels because their seamen upon receiving half wages have deserted and they were compelled to fill their places at the American rate of wages or the rates paid to seamen in American ports.

Congress, therefore, must have anticipated that the Act would not be enforced *unless Government aid were given,* and, therefore, they passed the laws above quoted, which were intended to open all the courts of the United States to seamen without the necessity of their paying fees in advance.

Petitioners, as seamen, belong to that class which have always been considered wards of the Court, and many special provisions have been incorporated into our laws, for their express benefit. The reason for this is that they are known to be a reckless class, careless as to their personal rights, uninformed in legal matters, but absolutely essential to the welfare of any commercial country. They are employed by powerful corporations which are able to go to any extreme to defeat a claim before the Court. It is proverbial that a seaman is prodigal with his earnings, and unless some safeguards be placed about him by the law he will be unable to enforce his rights before the courts, when occasion demands. Petitioners deny that this is Class Legislation, or, if it is, Congress has certainly con-

sidered that argument of no weight in legislating in favor of seamen. Title 53 of the United States Compiled Statutes of 1916 is filled with provisions for their benefit. Shipping commissioners are appointed; provision is made respecting the mode of shipping and discharge. Penalties are provided for disobedience of those rules; advances and allotments are prohibited, except in special cases, and many other safeguards are thrown about this specially privileged class. Congress passed the Seamen's Act with a view to aiding the establishment of a United States Merchant Marine, and said Act included the right of seamen to demand their wages in a particular way and made this Act apply to foreign as well as to domestic ships. The passage of this law, Congress knew, meant litigation, not in the lower courts alone, but in Courts of Appeal. Unless the same care is taken in safeguarding the rights of seamen on appeal as is taken in District Courts, their rights will be seriously infringed.

Petitioners, through their proctor, by motion, have obtained an extension of time in which to file the transcript of record herein to the 6th day of April, 1918, and unless said transcript of record is filed by that time, their appeal will be lost.

Your petitioners are informed and believe and aver that they have no right under the law to an appeal or a Writ of Error from said decree of the Circuit Court of Appeals, and that a mandamus from this Court is their only remedy.

WHEREFORE, your petitioners pray that a rule be made and issued from this Honorable Court, directed to William Parkin, Clerk of the United States Court of Appeals for the Second Circuit, and directing said William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Cir-

cuit, to show cause why a Writ of Mandamus should not issue commanding the said Clerk to file the transcript of the record in the case of Hassan Abdu *et al.*, libelant-appellants, against the S.S. *Nigretia*, etc., claimant-appellee, without the payment to him by petitioners, of the usual deposit of $35.00 as security for his fees, and for such other and further relief in the premises as shall seem just and meet, and your petitioners will ever pray, etc.

Dated, N. Y., March 15, 1918.

By SILAS B. AXTELL,
Attorney for Petitioners,
1 Broadway,
New York City.

VERNON SAIRS JONES,
of Counsel.

STATE OF NEW YORK,
CITY & COUNTY OF NEW YORK, } ss.:

SILAS B. AXTELL, being duly sworn, deposes and says: That he is attorney for the petitioners herein; that he has read the foregoing petition, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

The reason this petition is verified by attorney and not by petitioners is because said petitioners are now outside the jurisdiction of this Court, and outside the State of New York.

SILAS BLAKE AXTELL.

Sworn to before me this
15th day of March, 1918.

LILLIAN ZIMMERMAN,
New York County, No. 35.

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Supreme Court of the United States

October Term, 1917.

No. 31.

Ex parte

In the Matter

of

HASSAN ABDU, SAID ACHMED, SALI ACHMED, ACHMED HASSEN, ISHMEIL ALI and JOSE SAB,

Petitioners.

BRIEF FOR PETITIONERS

SILAS B. AXTELL,
Proctor for Petitioners,
One Broadway,
New York City, N. Y.

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TABLE OF CASES CITED.

Supreme Court of the United States

OCTOBER TERM, 1917.

HASSAN ABDU, SAID ACHMED, SALI ACHMED, ACHMED HASSEN, ISHMEIL ALI and JOSE SAB,

Petitioners,

against

WILLIAM PARKIN, Clerk of the United States Circuit Court for the Second Circuit.

BRIEF FOR PETITIONERS.

Statement of Facts.

Petitioners herein are six Arabian seamen, formerly members of the crew of the British steamship *Nigretia,* who made demand for half wages under Section 4530 of the United States Revised Statutes at the port of New York on December 18th, 1916.

They are claiming wages actually earned and due at the time of the demand, averaging over $300 per man. The Trial Judge found they had not made a proper demand, as he interpreted the Act, and consequently held that they were deserters. The

earnings of these seamen, who have dependent families, represented their labor for nearly a year, prior to the day of trial, and were thus forfeited. There were, however, questions of law in the case besides the demand for half wages, which merited an appeal and review by a higher court.

The libel was filed December 14th, 1916; issue joined January 6th, 1917, and the case brought to trial before Judge Martin T. Manton, United States District Court, Southern District of New York, May 2nd, 1917.

A decree was entered July 5th, 1917. An appeal was filed July 16th, 1917. Transcript of record was presented to the Clerk of the Circuit Court of Appeals for the Second Circuit October 12th, 1917. He refused to accept it without the prepayment of $35. This is a petition for a writ of mandamus to compel the said Clerk to accept the record without the prepayment of such fee or deposit.

The application herein prayed for came up for argument in October, 1917, before the Circuit Court of Appeals, Second Circuit, and a decision adverse to the claims of libelants-appellants was handed down.

The decision is as follows:

> "Proviso to Section 1 of C. 209, 1916, making a provision for clerk's fees does not apply to the clerk of the C. C. A. of this circuit, who is paid a salary and not out of fees, nor to anything occurring after July 1st, 1917. See Revised Statutes, Section 3690. Motion denied—appeal stayed.
>
> H. G. W.
> H. W. R.
> C. M. H."

It would seem that this decision was based clearly upon the ground that the Act relied upon, of July 1st, 1916, which was a provision of the sundry civil appropriation act, was merely an annual appropriation, and the relief granted was admitted to be granted by Congress thereunder July 1st, 1917.

A new motion was submitted on the ground and upon the allegations in the motion papers (see par. 8), that Congress on July 30th, 1917, *re-enacted this section*, which does not expire until June 30th, 1918. The new provision reads:

> "For fees of clerks $215,000: Provided, That courts of the United States shall be open to seamen, without furnishing bonds, or prepayment of or making deposit to secure fees or costs, for the purpose of entering and prosecuting suit or suits in their own name and for their own benefit, for wages or salvage and to enforce laws made for their health and safety: PROVIDED FURTHER, That for the calendar year nineteen hundred and seventeen and thereafter, the maximum personal compensation of clerks of the United States District courts shall in no case exceed $3,500 per annum, and that single fees only shall be charged by United States Marshals and clerks of the United States district courts against the United States and against private litigants in every judicial district."

POINT I.

By the enactment of Section 1630a (Act June 12, 1917, C. 27, Sec. 1) United States Compiled Statutes, 1917, Congress intended that all of the courts of the United States should be open to seamen therein described, without furnishing bonds, or prepayment of or making deposit to secure fees or costs.

The Court will, of course, take judicial notice of the existence, passage and contents *of the Seamen's Act of March 4th, 1915. It was "An Act to Promote the Welfare of American Seamen in the Merchant Marine of the United States, to Abolish Arrest and Imprisonment as Punishment for Desertion and to Secure the Abrogation of Treaty Provisions in Relation thereto; To Promote Safety at Sea."*

1st. It is contended that because of the many new radical and progressive, if not revolutionary, provisions of this Act it was reasonable to suppose that its enforcement would be resisted, that many appeals would be taken from the decisions of the lower courts, for the purpose of testing the validity and constitutionality of the Act.

2nd. Because some of the provisions of the Act were intended to benefit the people of the United States by releasing the law of supply and demand as to labor and thus equalizing wages on foreign and domestic vessels.

Congress, realizing that the enforcement of the Act would be opposed by powerful shipping interests and that seamen unassisted would find the ex-

pense of appeals a great burden, if not a bar, endeavored to assist by providing that they could commence and appeal their cases without the prepayment of fees or the filing of bonds.

At this point it is urged that this statute is distinguishable from the Pauper Act, and the controlling decision of this Court in *Re Bradford* v. *Southern Ry. Co.*, 195 U. S., 243, for two reasons:

First: This Act is not a poor persons' act, and does not permit suit without payment of fees, but merely says that the class of persons described seamen shall not be required to **prepay** the fees.

Second: This Act is not like the Pauper Act, intended for the benefit of certain indigent and impoverished persons, but is an *act* intended to benefit *directly* all seamen, and indirectly all the people of the United States.

The Act provides for the abrogation of treaties between the United States and foreign countries, relating to arrest of seamen deserting in American ports from foreign ships.

It provides for lifeboat drills, lifebuoys, the manning of boats, certificated boatmen, and many other requirements intended to conserve human life on the high seas. Also it contains a provision that a certain percentage of the seamen must be able to understand enough of the language spoken by the officers so that they can comprehend orders that are given to them.

All of these portions of the Act grew out of the sinking of the steamship *Titanic,* with the great loss of life incidental thereto, which was believed to be due largely to the neglect of the owners to have the ship adequately provided with lifesaving appliances and a fit crew.

The Act contains a provision that seamen on foreign ships in American ports shall be entitled to receive upon demand one-half wages they shall have then earned (at the time of the demand). It was well known by Congress that wages paid on foreign ships in foreign ports were much lower than the wages paid on American ships which engaged crews in American ports. It has been demonstrated that seamen engaged in American ports on American vessels would not desert in a foreign port, for the reason that they were getting better pay and treatment where they were, and, therefore, did not want to leave (see Dingley Act, 1884).

It further had been proven to members of Congress, by experiment of thirty years, that it was not feasible to discharge seamen engaged in American ports on American vessels in foreign ports. The difficulty of getting crews where such conduct was anticipated made it altogether impracticable (Dingley Act, 1884).

Congress, therefore, intended, it must be concluded, in view of this provision, and the provision that our treaties should be abrogated as to the arrest of seamen who deserted in our ports, that seamen should be permitted to break their contracts on foreign ships while in American waters.

The object of this whole Act was to advance the interests of American seamen and the merchant marine of the United States. Congress knew from the history of navigation and the committee hearings that had extended for over a period of twenty years that American shipowners could not operate vessels at a profit while competing with foreign shipowners, who engaged labor in foreign ports where labor is cheaper than in our ports, and while our laws and treaty provisions were such as to result

in the enforcement of the written contracts of employment entered into between foreign seamen and shipowners in foreign jurisdictions, no matter how harsh and binding.

This Seamen's Act, and particularly Section 4530, was intended without a doubt to equalize, if possible, the rate of wages paid on foreign and domestic vessels which engage in trade between American and foreign ports. If the Act were given full enforcement there can be little doubt but what that would be the result. The enforcement of the Act, so far as it has been permitted, has already caused a decided increase in the labor cost on foreign ships. This section is now before this court as to its constitutionality (see *Dillon* v. *Strathearn*, No. 868, set for argument October 14th, 1918).

This Act also provides that flogging and corporal punishment shall be prohibited on American vessels and renders the owners liable for violation of the Act in some instances (see Sec. 4 U. S. R. S. 4611; C. 153, S. 9; U. S. Comp. St., 1916, Sec. 8391).

The Act further provides that the payment of wages in advance of the time earned on American ships shall be unlawful, and this provision is, so far as possible, enforceable against foreign vessels as well; is an evident desire to equalize labor conditions as to American ships. This section, 10-a, of the Act is before the Court for interpretation in the case of *Nielsen* v. *Rhine*, No. 836, and *Hardy* v. *Windrush*, No. 837—as to foreign ships, in the case of *Sandberg* v. *The Talus*, No. 835 (Act 1884, as amended March 4th, 1915; U. S. Comp. Stat., Sec. 8323, 1916).

This section was upheld in *Re Clarke* by Judge A. N. Hand, United States District Court, Southern District of New York (reported *N. Y. Law Journal*, March 8th, 1917). Can it be that the

Courts of the United States intended that seamen who applied for a writ of *habeas corpus* in the District Court, being otherwise without funds or means, should not have the right to appeal to the Circuit Court of Appeals for relief? Under all the circumstances, in view of the litigation that was bound to follow the passage of this Act, and which did follow it, as evidenced by this case and many others on the dockets of our District Courts, can it be that Congress anticipated that there would not be an appeal where arrayed against the penniless seamen are wealthy foreign shipowners, who, as a matter of course, would appeal from decisions adverse to them?

The idea at one time prevailed in our courts that an appeal was not a matter of right or justice, but a matter of luxury. The frequent reversals on error in the lower courts in cases that have been carried to the Supreme Court of the United States and other appellate courts prove that an appeal is a matter of justice and right and not a mere luxury.

It is contended, of course, that the decision of this Court in the case of *Bradford* v. *Southern Ry. Co.*, 195 U. S., 243, rendered in 1904, is binding in the present case. It cannot be denied that the phraseology of the two statutes and the purposes to an extent are *similar*, but we believe that the cases are readily distinguishable, and that sufficient reason can be advanced for a different rule.

It is needless to review the prior decisions of the lower courts, to wit, *The Presto*, 93 Fed., 523; *McLain* v. *Williams*, 43 L. R. A., 287; *Sullivan* v. *Haig*, 10 L. R. A., 263; *Bailey* v. *Kincaid*, 57 Hun, 516, and *Butter* v. *Jarvis*, 117 N. Y., 115; *Halloran* v. *Ry. Co.*, 40 Texas, 465, and others, for the *Bradford* case is controlling.

The first distinction is that in the *Bradford* case the poor person was prosecuting a tort action against a railway company, a domestic corporation.

In the case at bar we have six destitute seamen suing for their wages under an uninterpreted and much-misunderstood statute of the United States (Sec. 4530 U. S. R. S., *supra*). The petitioners have probably no other property on earth than these small sums, the subject-matter of this litigation.

In the *Bradford* case the following was urged by the railway company in its brief (see 195 U. S., at p. 247):

> "It is well known that the courts are crowded with damage suits of every imaginable description against railroads and other corporations and that more than 90 percent of these cases are brought on a pauper's oath. Even if the defendant is successful in its defense of these cases, it is required as a matter of law to pay a proportion of the costs, that is, such costs as are incurred in its behalf."

And also:

> "If she (plaintiff) desires to prosecute the case further, she should be required to give a bond for costs unless she can show clear legislative authority for granting this writ of error on the pauper's oath."

The Court seems to have given a strict interpretation to the statute as urged by counsel, and we believe that the decision was eminently proper, because the Court's decision in the *Bradford* case was really *on the grounds of public policy.*

Public policy in the case at bar warrants a liberal interpretation of the Act.

Mr. Justice Fuller, who wrote the opinion, seems to indicate that, had it been deemed advisable, the Courts could grant poor persons the right of an appeal without payment of fees, but that under the circumstances the Court would not do so unless the legislative intent was clear—in fact, compelling (see p. 249):

> "There can be little doubt that the statute under which this motion is made, should be construed strictly; for the pauper comes to litigate entirely at the expense of others. He is neither to pay his own attorneys or counsel, nor is he liable to his adversary should the suit prove to be groundless. He thus enjoys a great privilege and exemption from the common lot of men, whereby in respect to causes of action proper, he becomes, as Lord Bacon says, rather able to vex than unable to sue. (*Hist. of Hen.*, 7.)
>
> Lord Bacon was referring to the statute 11 Hen. VII, c. 12, and his language is elsewhere translated and explained to mean 'that the charity of the legislature thought it better that the poor man should be able to vex than that he should not be able to sue.' 6 *Bacon's Works*, 161."

In the statute here involved the seaman is not a pauper, or even if he be actually he is not so defined. He is not relieved from paying the fees; it is merely provided that he need not **prepay** them.

Then, too, the class here sought to be benefited have long been regarded as wards of the Courts, and the actual beneficiaries of legislation that is not afforded by the Government to any other class of *individuals*.

The statute considered in the *Bradford* case was the Act of July 20th, 1892, which reads as follows (Sec. 1626, U. S. Comp. Stat., 1916):

> "This section and the four sections next following were an act entitled 'An Act providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court' first cited above, amended by act June 25th, 1910, c. 435, also cited above.
>
> This section, as originally enacted, was as follows:
>
> 'That any citizen of the United States entitled to commence any suit or action in any court of the United States may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor before or after bringing suit or action, upon filing in said court a statement under oath, in writing, that because of his poverty, he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action and setting forth briefly the nature of his alleged cause of action.'
>
> It was amended by act June 25, 1910, c. 435, cited above, to read as set forth here."

After the decision of this Court in 1904, Congress amended the Act on July 25, 1910, to read as follows (see Vol. 3 U. S. Compiled Statutes, 1916):

> "Sec. 1626 (Act of July 20th, 1892, c. 209, Sec. 1, as amended Act June 25th, 1910, c. 435). Suits and writs of error or appeals, etc., by poor persons without prepayment of or security for fees or costs; affidavit of poverty.
>
> Any citizen of the United States entitled to commence or defend any suit or action,

> civil or criminal, in any court of the United States, may, upon the order of the court, commence and prosecute or *defend* to conclusion any suit or action, or *a writ of error, or an appeal to the circuit court of appeals or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of error is not taken in good faith,* without being required to prepay fees or costs or for the *printing of the record in the appellate court* or give security therefor, before or after bringing suit or action, *or upon suing out a writ of error or appealing,* upon filing in said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action or *of such writ of error or appeal,* or to give security for the same, and that he believes that he is entitled to the redress he seeks by such suit or action or *writ of error or appeal,* and setting forth briefly the nature of his alleged cause of action *or appeal.* (27 Stat. 252, 36 Stat. 866.)"

(Principal changes indicated by *italics.*)

The statute involved in the case at bar, which appears on page 3236, Vol. 3 of the 1916 U. S. Compiled Statutes, says:

> "The courts of the United States shall be open to seamen without the prepayment of or making deposit to secure fees."

What effect are we going to give to this Act of Congress in view of the amendment of the Pauper Act in 1910, following the decision of the Supreme Court in the *Bradford* case.

That there was some relation between the amendment of 1910 and the decision of this Court in

1904 there can be little doubt. Congress furnished the clear legislative mandate declared by the Court to be essential.

Now, in 1916 and 1917, when Congress briefly says "Courts of the United States shall be open," is it possible, in view of the legislative development of the statute, to suppose that the Congress meant only United States District Courts? Surely, had Congress intended to limit the seamen to an action in the District Court, Congress would have so stated.

We are content to rest the matter there, knowing that this Court is responsive to the ever changing needs of the people of this country. Congress passed this law in order that the Seamen's Act or those portions of it affecting the wages of seamen especially might be enforced—the Seamen's Act is rightly called the Seamen's Emancipation Act—it breaks his bondage and gives him freedom. America has made ships a decent place to live in and the seamen's calling a possible one for a people who are used to the blessings of liberty, just as America to-day is fighting to make the world a decent place to live in and to preserve the right to all people to live and enjoy the rights of liberty.

As never before are the rights of labor *recognized,* and rightly so. We quote from the speech of the President at Buffalo, November 12th, 1917:

> "While we are fighting for freedom, we must see among other things that LABOR IS FREE, and that means a number of interesting things. It means not only that we must do what we have declared our purpose to do, see that the conditions of labor are not rendered more onerous by the war, but also that we shall see to it that the instrumentali-

ties by which the conditions of labor are improved are not blocked or checked. That we must do" (Woodrow Wilson, New York).

We are asking of seamen greater service and greater risks than ever before. The welfare of the people of the United States depends on our ability to enforce the Seamen's Act, in view of the difference in labor cost in American and foreign ports; therefore, on grounds of public policy it is submitted this Court should hold that "Courts of the United States" as here used means "all courts of the United States."

The welfare of the people of the United States depends upon our ability to operate and maintain a merchant marine on a sound self-sustaining basis. That can be done only on a basis of equal wage cost with foreign competitors. The surest way to equal wage operating cost is by the full enforcement of the provisions of the Seamen's Act. That the Act has not been fully enforced by decrees of Judges of the United States District Courts in the following cases:

Jacobson v. *Delogoa,* 244 F., 835.
Jacob v. *Haskell,* 235 F., 914.
Baxter v. *Clematis,* 244 F., 484.
The Metior, 241 F., 735.
The Belgier, 246 F., 966.
Hanson v. *Earl of Elgin* (S. D. N. Y., not reported, 1918).
Von Beekman v. *Veerhaven* (S. D. N. Y., not reported, 1918).
Abdu v. *Nigretia* (at bar).
Pinero v. *Rio Grande* (S. D. N. Y., 1917, not reported).

In quite a number of cases the Act has been upheld in the District Courts, but in practically every instance the *shipowner has appealed.* If the relief herein prayed for is granted many of the above-mentioned adverse decisions will be appealed.

Therefore, on grounds of public policy, as in the *Bradford* case, Congress not having clearly stated by its spoken word that any courts shall be closed to seamen, all should be open.

POINT II.

The fact that the Clerk of the Circuit Court of Appeals in this circuit is paid a salary, and that his compensation is not dependent upon the collection of fees has no bearing on the points involved.

One infers from the reading of the opinion of the Court below, its decision was based partially upon the fact that the Clerk of the Circuit Court is paid a salary. Nobody yet has endeavored to prove that Acts of Congress unerringly accomplish what they were intended to accomplish. It would seem from the proviso in the enactment, at first glance, that the collection of fees by the Clerk of the court had something to do with the right that is granted to seamen.

This enactment was tacked on to the Civil Sundry Appropriation Act as a rider—there is no doubt about that. As a piece of legislation it belongs to the Judiciary Act, and is so placed in the Compiled Statutes.

The word "provided," undoubtedly, was inserted in order to connect it up with the $215,000, which

was being appropriated, and in that way should become part of the Civil Sundry Appropriation Act, and thus become a law of the United States. This method of legislation is not a new one, and this is by no means the first time that it has been adopted. The members of Congress have been extremely busy, and presumably those who were interested in securing the passage of this enactment found it more expedient to get the legislation on our statute books by this method, than by attempting to put it through as an independent Bill. Had that been done the Bill would have been referred to a different committee and have had to survive or die with hundreds of other Bills. It was tacked on to the Civil Sundry Appropriation Act, which had to be passed by Congress and thus it went through (Sec. 1630a, Act June 12, 1917, C. 27, Sec. 1).

In conclusion the following reasons why an interpretation of this Act beneficial to petitioners should be rendered by this Court, are respectfully submitted:

1st. Because the Act, known as the Seamen's Act of March 4th, 1915, is of a highly remedial character, revolutionary and radical in many of its phases, and necessarily would and has resulted in a great deal of litigation.

2nd. Because the questions involved, raised by the Seamen's Act, are in many instances constitutional in character or require the review of a higher court.

3rd. Because the point of view and desire of the people of the United States in 1918, is more progressive and liberal than it was in 1904 when the *Bradford* case was decided.

4th. Because Congress in 1910, following the decision of the Supreme Court in the *Bradford* case, amended the Act in such a manner as to remove all doubt as to their intention to give poor persons *the right of appeal*, as well as the right of "a conclusion" in the court of original jurisdiction.

5th. Because the wording of this enactment is broad enough to grant the relief prayed for.

6th. Because of the remedial character of this enactment, as well as the remedial character of the Seamen's Act itself, a liberal interpretation rather than a technical one should be placed upon this section, especially in view of the historical development of legislation of this character, and the previous interpretation placed upon it by this our court of last resort.

7th. Because it is evident from the entire construction of legislation on this subject, that it is the intention of Congress, that all of the United States Courts shall be open to seamen, and that the expenses of their litigation shall be borne by the Government of the United States if they are unable to bear it.

8th. Because the complete enforcement of the Seamen's Act is a matter of public concern to the people of the United States.

It would seem therefore that the fact that Clerks are put upon salaries not dependent upon fees collected, is an argument more in favor of petitioners here than against them.

Respectfully submitted,

SILAS B. AXTELL,
Proctor for Petitioners.

VERNON SIMS JONES,
Of Counsel.

SUPREME COURT
OF THE UNITED STATES,

OCTOBER TERM, 1917.

No. 31, Original.

In the Matter

of

HASSAN ABDU, SAID ACHMED, SALI ACHMED, ACHMED HASSAN, ISHMEIL ALI and JOSE SAB,
Petitioners.

RETURN TO ORDER TO SHOW CAUSE.

To the Honorable the Chief Justice and Associate Judges of the Supreme Court of the United States:

In obedience to the order of the Supreme Court in the above entitled matter dated April 1, 1918, requiring the undersigned, as Clerk of the United States Circuit Court of Appeals for the Second Circuit, to show cause why a writ of mandamus should not be granted as prayed for in the petition of the above named petitioners to the Supreme Court, sworn to on the 15th day of March, 1918, the undersigned respectfully submits:

On August 14, 1917, the petitioners herein tendered to the respondent a transcript of rec-

ord on appeal in the case of Hassan Abdu and others against the steamship *Nigretia*, and asked that the same be filed without payment of fees.

By the fee bill established by law for the United States Circuit Court of Appeals, a fee of $5 is payable by the appellant on filing a transcript of record, and other fees are payable to the Clerk during the prosecution of an appeal, to final decree.

Under the Statutes of the United States in such case made and provided, to wit, Chap. 791 of the Laws of 1900 (31 Stat. at Large, P. 639), it is the duty of the Clerk of the Court to collect the said fees and to account therefor, and pay over the same to the Treasury of the United States, after paying the expenses of his office.

For the protection of the Clerk the rule of the said Circuit Court of Appeals for the Second Circuit, to wit, Rule 36, provides that in all cases the plaintiff in error, or appellant, on docketing a case and filing a record, shall enter into an undertaking with the clerk for the payment of his fees, or otherwise satisfy him in that behalf. The customary security is a deposit of $35.

Upon the refusal of the petitioners herein to make this deposit on the docketing of their appeal and filing of their transcript of record, or to pay any fees for the filing of the record and docketing the case, this respondent refused to file the record or docket the case.

Thereafter and on October 23rd, 1917, a notice was served on this respondent of a motion before the Circuit Court of Appeals for the Second

Circuit, to compel him to file the record and docket the case without payment of fees; and said motion having come on to be heard, the said court rendered the decision set forth in the petition herein, on pages 5 and 6 thereof, denying the said motion, and on November 23, 1917, an order was duly made and entered thereon, a copy of which is hereto annexed as "Exhibit A."

Thereafter and on or about February 5, 1918, the petitioners renewed the said motion, and the same having been duly heard and considered a second time, the Court rendered the decision set forth in the petition herein, on page 7 thereof, denying the said motion; and on February 19, 1918, an order was duly made and entered thereon, a copy of which is hereto annexed as "Exhibit B."

This respondent further says that he is not informed as to the other matters set forth in the petition herein, which are not involved in the matter of the two motions made by the petitioners as aforesaid, and in the orders of the Circuit Court of Appeals for the Second Circuit denying the said motions.

The petitioners err in setting forth, as they have done in their petition, the contention that the Circuit Court of Appeals for the Second Circuit denied their motions as aforesaid solely on the ground that this respondent is not paid out of fees, but is paid a fixed salary.

Section 1630-A of the United States Compiled Statutes of 1916, being the Act of July 1, 1916, Chapter 209, Article I, referred to on page 4 of

the petition herein, and the Act of July 12, 1917, referred to on page 6 of the petition herein, were not set forth before this Court by this respondent as a defense to the two motions of the petitioners aforesaid. *On the contrary, the aforesaid statutes were urged by the proctor for the petitioners as a reason why this respondent should be compelled to receive the petitioners' record on appeal and docket the case without prepayment of fees or costs, although the petitioners now take the position that the provisions of the said statutes are not material here.*

Insofar as the Circuit Court of Appeals, in deciding the two motions of the petitioners, referred to the said statutes, the reference was made solely to answer the contention of the proctor for the petitioners herein, and the finding of the Circuit Court of Appeals as to both motions was that the question raised under the aforesaid statutes with regard to payment of Clerks' salaries was immaterial as to the determination of this respondent's right to refuse to receive petitioners' record on appeal and docket their case, without prepayment of fees.

In other words, the Circuit Court of Appeals decided that on the actual question of law involved the motions should be denied; and that the questions raised by proctor for the appellants under the Statutes referred to above were immaterial.

This ruling as to the immateriality of the questions raised under the statutes referred to is in fact the ruling of the Chief of the Division of Accounts of the Department of Justice, in the last paragraph of the letter set forth on page 9 of the petition herein.

Even if the Act of July 12, 1917 (petition, page 6) is to be considered, *it is significant that the Act applies specifically only to the fees of Clerks of the United States District Courts.*

The petitioners herein have wholly failed to comprehend the actual question of law involved which was decided by the Circuit Court of Appeals, and concerning which this petition is now being presented to this Honorable Court.

The only question involved is whether the rule set forth in the United States Statutes in the Act of July 12, 1917, set forth on page 6 of the petition herein, and which provides that courts of the United States shall be open to seamen without furnishing bonds or making deposit to secure fees or costs, for the purpose of commencing and prosecuting suit or suits in their own name and for their own benefit, for wages or salvage, and to enforce laws made for their health and safety, applies only to proceedings in the District Courts of the United States, or also applies to proceedings on appeal in the Circuit Courts of Appeal.

This respondent respectfully shows to the Court that under the decisions heretofore handed down, the Circuit Court of Appeals for the Second Circuit was correct in denying the aforesaid motions of the petitioners herein, because of the fact that the statute just referred to does not apply to appeals to the Circuit Courts of Appeal of the United States.

In the case of *Bradford* v. *Southern Railway Co.*, 195 U. S., 243, this honorable court held that the Act of July 20, 1892, allowing prosecu-

tion of suits by poor persons *in forma pauperis,* without being required to prepay fees or costs, does not apply to proceedings on appeal. The statute *in forma pauperis* involved in that decision was even stronger than the statute relied on by the petitioners herein, in that it provided that poor persons might "commence and *prosecute to conclusion* any such suit or action without being required to prepay fees or costs." (Italics ours.)

It was argued in the Bradford case that the words, "and prosecute to conclusion," should include appellate proceedings. The Court, however, at page 248, held that the words quoted refer only to conclusion of the suit or action in the court in which it is commenced.

The Court said further at page 250:

"So in *Bristol* v. *United States,* 129 Fed. Rep., 87, where the Circuit Court of Appeals for the Seventh Circuit held that the Act of Congress of July 20, 1892, did not entitle a defendant in a criminal case to prosecute a writ of error out of the Circuit Court of Appeals *in forma pauperis,* Jenkins, *J.,* delivering the opinion, said:

> "'We do not think that it can properly be said that a writ of error is a suit or action within the statute so far as respects a writ of error in a criminal case. Were it not for the words "prosecute to conclusion," we doubt if any court would hold that the act applied to an appeal or writ of error in a civil cause. The applicant by the statute must declare the nature of his cause of action. Surely an erroneous ruling by the trial court cannot be held to furnish "a cause of action," as that phrase is commonly understood. The statute, by that term, in

> our judgment, refers to a legal demand by one against another, not to the rulings of a trial court. Under a somewhat similar statute of the state of New York, its Supreme Court, speaking through Judge Cowen, held that the provisions of the statute do not extend to writs of error. *Moore* v. *Cooley*, 2 Hill, 412.'

"We adhere to the view that the act, on its face, does not apply to appellate proceedings, and that it does not is sustained by other considerations.

"The act of July 20, 1892, does not purport to grant the right to prosecute a writ of error or an appeal, and that right depends on statute and not on the common law. *United States* v. *More*, 3 Cranch, 159, 171."

The court said further at page 251:

"2. The second question is, whether, if the act of July 20, 1892, does not apply to appellate proceedings, the Court of Appeals, has 'any authority to permit the prosecution of a writ of error *in forma pauperis*.'

"We answer that that court has no such power unless derived from statute, and we find no statute authorizing any order to that effect.

"Costs are the creatures of statute, and it is settled that authority to permit prosecution *in forma pauperis* must be given by statute."

Similar decisions have been reached in the following cases; *Gallaway* v. *State National Bank*, 186 U. S., 177; *The George Hill* (C. C. A., 2nd C.), 192 Fed., 1022; *Bristol* v. *U. S.* (C. C. A., 7th C.), 129 Fed. Rep., 87; *Taylor* v. *Adams Express*

Co. (C. C. A., 3rd C.), 144 Fed. Rep., 616; *The Presto* (C. C. A., 5th C.), 93 Fed., 522.

In the case of *The Presto*, 93 Fed., 522, the court, in defining the basis of its decision, said at page 524:

"Even if express statutory authority is not required to dispense with an appeal bond, we think that the object and purpose of the statute in question was to give a poor person unable to advance costs an opportunity to have his case inquired into by a responsible court; and we cannot infer that it was the intention of Congress that after the commencement and prosecution of the case through the court of original jurisdiction, the case should thereafter be carried through all the Appellate Courts without security for the costs and fees necessarily incurred. It would be a decided injustice to the adverse party to make him responsible for all costs in the court of original jurisdiction, and thereafter, without the usual security, give his opponent the right to carry him through the Appellate Courts."

There is not any statute of the United States which specifically allows the prosecution of an appeal in the United States Circuit Court of Appeals for the Second Circuit without prepayment of costs.

This respondent respectfully contends that the rule as applied heretofore by the courts with respect to the statutes providing for suits *in forma pauperis*, as referred to above, should apply with equal force to the suits commenced by seamen under the Act of July 12, 1917, inasmuch as the intent and purpose of the provisions of both

acts are the same. It seems clear that the purpose of the Act of July 12, 1917, with respect to seamen, was merely to enable them to institute and prosecute suits to a conclusion in the District Courts without prepayment of fees and costs, solely in order to enable seamen to have their day in court. Having once had their day in court, they should not be allowed to proceed to appellate courts without prepayment of fees and costs.

This is in effect the result reached by the Circuit Court of Appeals for the Second Circuit in deciding the two claims of the petitioner as hereinabove referred to, and this decision is in accordance with the principles laid down in the decisions with respect to the suits in *forma pauperis* to which reference has been made above. The correctness of this rule of the Circuit Court of Appeals is the sole question which is presented to this Honorable Court by the petitioners herein, and it is for this reason that the statutes regarding the payment of clerk's fees referred to and dwelt on in great length in the petition are wholly immaterial and irrelevant.

The respondent herein has at all times complied with the orders entered herein by the Circuit Court of Appeals for the Second Circuit as set forth in Schedules "A" and "B" annexed hereto. *Any relief which the petitioners may claim, therefore, from this Court, should be obtained through a Writ of Certiorari as to the rulings of the said Circuit Court of Appeals aforesaid, and not by Mandamus against this respondent.*

WHEREFORE this respondent prays that the said petition may be dismissed with costs.

WILLIAM PARKIN,
KIRLIN, WOOLSEY & HICKOX,
Proctors,
27 William Street, N. Y.

JOHN M. WOOLSEY,
Of Counsel.

STATE OF NEW YORK,
County of New York, } ss.:

WILLIAM PARKIN, being duly sworn, says:

I am the respondent herein. The foregoing return to order to show cause is true of my own knowledge, except as to matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

Sworn to before me this
day of , 1918.

SCHEDULE "A."

At a stated term of the United States Circuit Court of Appeals for the Second Circuit, held at the court rooms in the Post Office Building, City of New York, on the 23rd day of November, 1917.

Present:—Hon. Henry G. Ward,
" Henry Wade Rogers,
" Charles M. Hough,
Circuit Judges.

Hassan Abdu *et al.*,
Libellants-Appellants,

v.

S. S. "Nigretia," her engines, etc., Limerick S. S. Co.,
Claimant-Appellee.

A motion having been made herein by counsel for the appellant for an order directing the clerk of this court to file and docket the record on appeal herein without the payment of fees or costs;

And a cross-motion having been made by counsel for the appellee that the proceedings on appeal be stayed until the filing by the appellants of a good and sufficient bond to cover the costs which may be awarded to the appellee on the appeal herein;

Upon consideration thereof it is

ORDERED that the motion to file the record without the payment of fees be and hereby is denied.

FURTHER ORDERED that the motion to stay the proceedings on appeal until the filing of a good and sufficient cost bond be and hereby is granted.

H. G. W.
H. W. R.

SCHEDULE "B."

At a stated term of the United States Circuit Court of Appeals for the Second Circuit, held at the court rooms in the Post Office Building, City of New York, on the 19th day of February, 1918.

Present:—Hon. Henry G. Ward,
" Henry Wade Rogers,
" Charles M. Hough,
Circuit Judges.

Hassan Abdu *et al.*,
Libellants-Appellants,

v.

Steamship "Nigretia," her engines, etc., Limerick Steamship Company,
Claimant-Appellee.

A motion having been made herein by counsel for the appellant for leave to file the record on appeal herein without the payment of fees;
Upon consideration thereof it is

Ordered that said motion be and hereby is denied.

H. G. W.
H. W. R.

EX PARTE ABDU ET AL., PETITIONERS.

PETITION FOR WRIT OF MANDAMUS.

No. 31, Original. Argued April 29, 1918.—Rule discharged May 20, 1918.

In a case ultimately within its reviewing power, this court has jurisdiction to require by mandamus the filing of the record in the Circuit Court of Appeals.

Where the refusal to file was in accordance with orders of the Court of Appeals, relied on in the clerk's answer, *held* that, while properly the relief should have been directed to the court, under the peculiar circumstances the irregularity might be treated as formal and the authority to make the orders be determined with the clerk alone as technical respondent.

The provision in the Act of June 12, 1917, c. 27, 40 Stat. 157, that "courts of the United States shall be open to seamen, without furnishing bonds or prepayment of or making deposit to secure fees or costs, for the purpose of entering and prosecuting suit," etc., does not apply to appellate proceedings.

Rule discharged.

THE case is stated in the opinion.

Mr. Silas B. Axtell, with whom *Mr. Vernon S. Jones* was on the brief, for petitioners.

Mr. Robert S. Erskine, with whom *Mr. John M. Woolsey* was on the brief, for respondent.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

In the trial court the petitioners, six in number, Arabian seamen and members of the crew of a British ship, as libellants sought to enforce the payment of one-half their wages in reliance upon the provisions of § 4530, Rev. Stats., as amended by § 4 of the Act of March 4, 1915, c. 153,

38 Stat. 1165. In granting an appeal from a decree dismissing their claim the court, in view either of the provisions of the Act of Congress of July 1, 1916, c. 209, 39 Stat. 313, or those of the Act of June 12, 1917, c. 27, 40 Stat. 157, or both, directed that the appellants be permitted to perfect their appeal without cost.

In the Circuit Court of Appeals the clerk declined to file the record without the deposit to secure costs required by the rules. The court was asked to direct the clerk to do otherwise, but for reasons stated in a brief memorandum it refused to do so. Assuming that this action was based solely on the view that the Act of 1916 had ceased to be operative by limitation of time, relying upon the Act of 1917, the request for direction to the clerk to file the record without costs or security for the same was again made to the court and refused upon the ground of want of merit in the application, that is, upon the conclusion that the act of Congress relied upon did not relieve seamen from costs in appellate courts. Leave to present a petition for mandamus against the clerk to compel him to file the record without costs was then here granted and the matter is before us on the submission of the rule to show cause consequent upon such permission and the answer of the clerk to the rule setting out the action of the court, in which answer reliance is placed upon the orders of the court which are appended and the two opinions expressed by the court on the subject.

The existence of ultimate discretionary power here to review the cause on its merits and the deterrent influence which the refusal to file must have upon the practical exertion of that power in a case properly made gives the authority to consider the subject which the rule presents.[1] But that does not without more dispel the seeming con-

[1] *Ex parte Crane*, 5 Peters, 190, 193–194; *Chateaugay Iron Co., Petitioner*, 128 U. S. 544; *Hollon Parker, Petitioner*, 131 U. S. 221, 225–226; *In re Hohorst*, 150 U. S. 653; *In re Grossmayer*, 177 U. S. 48, 49–50.

fusion resulting from the fact that the remedy prayed is directed not to the court below but to its clerk and hence in form the relief sought is a mandamus to direct the clerk to disobey the order of the court, leaving the order unreviewed and unreversed. The incongruity is obvious and we cannot as a general rule sanction it. Looking, however, through form to the essence of things, as no mere independent action of the clerk as clerk is involved, but the authority exerted by the court in directing the action of the clerk complained of is the subject-matter at issue and is the only justification relied upon by the clerk in the answer to the rule, we are of the opinion that in the exercise of a sound discretion we may treat the case from that point of view, that is to say, under the circumstances consider the authority to have made the order with the clerk alone as a technical party to the proceeding.

The contention that the court mistakenly refused to permit the appellate proceedings to be conducted without payment of costs is based upon a provision in the Appropriation Act of June 12, 1917, as follows:

"*Provided,* That courts of the United States shall be open to seamen, without furnishing bonds or prepayment of or making deposit to secure fees or costs, for the purpose of entering and prosecuting suit or suits in their own name and for their own benefit for wages or salvage and to enforce laws made for their health and safety."

The provision does not in express words relate to appellate proceedings and the whole argument advanced to sustain the theory that it includes such proceedings rests upon the conception that because the provision was intended to benefit seamen by giving them access to the courts without cost, therefore by necessary implication the statute should be construed as all-embracing, that is, as giving the right to carry on appellate proceedings free from costs. But this simply assumes the proposition contended for and after all comes but to the contention

that, because the statute gives the right which is asserted, therefore the statute should be construed as conferring it and its enjoyment consequently sustained. The error results from disregarding the broad distinction which exists between the right to be heard in courts of justice on the one hand and the necessity for the grant of authority on the other to review the results of such hearing by proceedings in error or appeal. *Reetz* v. *Michigan*, 188 U. S. 505, 507–508; *United States* v. *Heinze*, 218 U. S. 532, 545–546; *Lott* v. *Pittman*, 243 U. S. 588, 591. This obvious distinction between the two we are of opinion, in the absence of a clear and express legislative direction to the contrary, excludes the possibility of giving the statute the all-embracing construction sought to be applied to it. And the correctness of this opinion is we think conclusively illustrated by a consideration of prior statutes dealing with a somewhat cognate subject and the decisions concerning the same. Act of July 20, 1892, c. 209, 27 Stat. 252; Act of June 25, 1910, c. 435, 36 Stat. 866; *Bradford* v. *Southern Ry. Co.*, 195 U. S. 243; *Kinney* v. *Plymouth Rock Squab Co.*, 236 U. S. 43. In other words, under the Act of 1892 conferring a right to prosecute *in forma pauperis* suits in courts of the United States, which was certainly as broad in its language as the one now under consideration, it was decided in the *Bradford Case* that the right did not embrace appellate proceedings. And when following that decision the statute was amended by the Act of 1910 so as to cause it in express terms to be applicable to appellate proceedings, the right was subjected to accompanying restrictions and safeguards which as held in the *Kinney Case* made the new right not absolute, but dependent not only upon the limitations which were otherwise put in the statute but also upon the exercise of a sound discretion by the appellate court. The statute before us, as we have seen, which was enacted in 1917 after the decision in the *Bradford Case*, contains none of the ex-

press provisions as to appellate proceedings inserted in the Act of 1910. Thus if resort is to be had to legislative history and the implication of legislative intent as a means of reading into the statute that which it does not contain, a contrary result must necessarily follow, since the conclusion from considering that subject must be that the Act of 1917 enacted after the *Bradford Case* in not expressing the right to be exempt from costs in appellate proceedings was intended to conform and give effect to the rule announced in the *Bradford Case*.

Rule discharged.

MR. JUSTICE BRANDEIS, dissenting.

I am unable to concur in the decision of the court. Congress declared without qualification: "That courts of the United States shall be open to seamen . . . for the purpose of entering and prosecuting suit" . . . "without . . . making deposit to secure fees or costs." There being no qualification, the words "courts of the United States" mean *all* the courts in which seamen may have occasion to enter and prosecute suits. Seamen have occasion to enter and prosecute such suits in appellate courts. Consequently they should be permitted to do so "without . . . making deposit to secure fees or costs."

MR. JUSTICE CLARKE joins in this dissent.